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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LOUISETTE GEISS, et al.,

4 Plaintiffs,

5 v.

17 CV 9554 (AKH)

6 THE WEINSTEIN COMPANY HOLDINGS
7 LLC, et al.,

8 Defendants.

Oral Argument

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9
10 New York, N.Y.
September 12, 2018
2:30 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN

13 District Judge

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15
16
17 APPEARANCES

18 HAGENS BERMAN SOBOL SHAPIRO LLP

19 Attorneys for Plaintiffs

20 BY: ELIZABETH A. FEGAN

and

21 THE ARMENTA LAW FIRM

Attorneys for Plaintiffs

22 BY: CREDENCE SOL

23 SEYFARTH SHAW LLP

Attorneys for Defendant Weinstein Company

24 BY: GERALD L. MAATMAN

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1 (Case called)

2 MS. FEGAN: Good afternoon, your Honor. Elizabeth
3 Fegan and Credence Sol, for plaintiffs.

4 MR. PUTNAM: Marvin Putnam of Latham & Watkins, on
5 behalf of Miramax as well as Tim Sarnoff.

6 THE COURT: Why don't you introduce everybody on the
7 bench.

8 MR. PUTNAM: I couldn't do so if I wanted to, your
9 Honor.

10 THE COURT: Try.

11 MR. PUTNAM: This is Laura Washington. She works with
12 me at Latham. She's also here on behalf of Miramax as well as
13 Tim Sarnoff.

14 Next, I have Gary Stein.

15 Gary Stein is here on behalf of one of the independent
16 directors.

17 MR. STEIN: Not quite correct. I am here on behalf of
18 defendant Bob Weinstein, your Honor.

19 Good afternoon. Gary Stein from Shulte Roth & Zabel.

20 MS. KUPFERSTEIN: Good afternoon, your Honor.

21 Phyllis Kupferstein, of behalf of Harvey Weinstein.

22 THE COURT: My apologies to you, Ms. Kupferstein
23 again.

24 MS. KUPFERSTEIN: Thank you so much, your Honor. I
25 appreciate that.

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1 THE COURT: Had I been aware, I would not have
2 scheduled it this way. It just happened. I'm very flexible.

3 MR. MAATMAN: Good afternoon, your Honor.

4 Gerald Maatman of Seyfarth Shaw, on behalf of the
5 Weinstein Company.

6 MS. DAVIS: Good afternoon, your Honor. Abby Davis,
7 of Skadden Arps, on behalf of Dirk Ziff and James Dolan.

8 MR. SPIEGEL: Lawrence Spiegel, Skadden Arps, same
9 defendants.

10 MR. FINZI: Good afternoon, your Honor.

11 Roberto Finzi, with my colleague Sara Nichols. We are
12 here for Marc Lasry.

13 MR. MASELLA: Good afternoon, your Honor. James
14 Masella from Patterson Belknap Webb & Tyler, on behalf of Paul
15 Tudor Jones.

16 MR. SCALZO: Good afternoon, your Honor. John Scalzo,
17 of Reed Smith, on behalf of Richard Koenigsberg.

18 MR. DAVID: Good afternoon, your Honor. Israel David
19 from Fried Frank on behalf of Lance Maerov and Jeff Sackman.

20 THE COURT: Anyone else?

21 Never again will I receive ten briefs from the
22 defendants. Never again. If that happens, I will read the
23 first brief and throw away the rest.

24 You are seriously imposing on the judge just to
25 aggrandize yourselves. Your job is to put it all together and

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1 just present one brief, unless there are separate issues, and
2 then only on the separate issues should there be a separate
3 brief.

4 Is that clear?

5 I will have one lawyer for each side, one for the
6 plaintiff and one for the defendant. Who is going to be
7 plaintiffs' lawyer?

8 MS. FEGAN: I will be, your Honor.

9 THE COURT: Ms. Fegan?

10 MS. FEGAN: Yes.

11 THE COURT: And who will be the defendants' lawyer?

12 MR. STEIN: Your Honor, the defense group did caucus
13 before this argument to try to deliver it in the most efficient
14 manner possible for the Court. We don't plan to have every --

15 THE COURT: Who is going to be the lawyer?

16 Don't give me the talk. Who's going to be the lawyer?

17 MR. STEIN: We had planned, your Honor, to have
18 three --

19 THE COURT: One.

20 MR. STEIN: Three or four separate because of the
21 different groups involved.

22 THE COURT: One. You are all going to argue RICO,
23 right?

24 MR. STEIN: We were all going to argue separate
25 issues.

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1 MR. PUTNAM: Actually, your Honor --

2 THE COURT: That is all. You are not talking anymore.

3 MR. PUTNAM: Your Honor --

4 THE COURT: Unless you are answering my question, you
5 are not talking.

6 MR. PUTNAM: I am going to answer your question, your
7 Honor.

8 THE COURT: Yes.

9 MR. PUTNAM: What we did is we broke it up by separate
10 issues so one person is not arguing the same issue as another.

11 We have different people arguing different issues.
12 For example, I was going to run through statute of limitations
13 as well as the beginning of RICO in terms of standing and
14 injury.

15 Then I was going to turn to Mr. Stein, and then he was
16 going to go through the various RICO elements.

17 THE COURT: No. You do everything, Mr. Stein.

18 MR. STEIN: Me? I will do my best, your Honor.

19 THE COURT: What is your name, sir?

20 MR. PUTNAM: Sorry. I'm Marvin Putnam.

21 THE COURT: Mr. Putnam, you do everything.

22 OK.

23 THE COURT: I don't see where you are. What is your
24 firm?

25 MR. PUTNAM: Latham & Watkins, sir.

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1 THE COURT: Your name again?

2 MR. PUTNAM: Marvin Putnam, P-u-t-n-a-m.

3 THE COURT: OK. Mr. Putnam, you do everything.

4 MR. PUTNAM: Shall I begin now, your Honor?

5 THE COURT: All right.

6 So let's do this. I have a number of issues which I
7 have organized.

8 Can you hear me?

9 MR. PUTNAM: Yes, your Honor.

10 THE COURT: And I am going to call upon one side or
11 the other to discuss various issues. So let me start with the
12 plaintiff.

13 Ms. Fegan, would you take the podium, please.

14 MS. FEGAN: Yes, your Honor.

15 THE COURT: One of the main points defendants have is
16 an allegation, claim, argument that the four-year statute of
17 limitations under RICO bars the claims against everybody.

18 You have argued that, although there is not fraudulent
19 concealment in that every plaintiff knew about the cause of
20 action when she was violated, that the intimidation that
21 occurred and the aftereffects of the violations have caused an
22 intimidation that has prevented the plaintiffs from suing.

23 It is only now, with lots of women coming forward
24 against lots of executives, that they have gained the courage
25 to sue, the lawsuit having been filed December 6, 2017.

1 Is that a fair summary of your position?

2 MS. FEGAN: Your Honor, with respect to the RICO claim
3 in particular, it wasn't until the fall of last year that the
4 plaintiffs even knew that Harvey Weinstein and the Weinstein
5 Company and others had blacklisted them, had put them on a hit
6 list.

7 THE COURT: They couldn't have been intimidated then.

8 MR. PUTNAM: Your Honor, separately we do suggest with
9 respect to witness tampering and the predicate acts of witness
10 tampering that for some of them immediately after the assaults
11 Mr. Weinstein took certain steps to ensure that they would be
12 quiet.

13 THE COURT: But they didn't know about it.

14 MS. FEGAN: There's two separate things.

15 First, there was the prevention of them going to a
16 federal officer or a law enforcement officer to report the
17 assaults in the first instance.

18 THE COURT: What prevented them?

19 MS. FEGAN: Your Honor, Mr. Weinstein --

20 THE COURT: Their fear?

21 MS. FEGAN: Their fear, your Honor.

22 THE COURT: They were afraid to come forward, whether
23 through embarrassment or for fear that there would be serious
24 repercussions and so on, but it was their choice. There was no
25 separate act that caused them to be intimidated.

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1 MS. FEGAN: So the assaults themselves -- there were
2 multiple acts that he took, not just the assaults. For
3 example, with respect to Melissa Sagemiller one of our
4 plaintiffs, she was on set up in Toronto, Canada. She wanted
5 nothing to do with him after the assault.

6 She went to the airport to go home. She was paged in
7 the airport, went to a phone not knowing who it was. It turned
8 out Mr. Weinstein had the power to take her bags off the
9 commercial airline.

10 THE COURT: And put it in a private airplane.

11 MS. FEGAN: And put it in a private airplane. He
12 wanted to make sure -- and he did this with several
13 plaintiffs -- that they knew that he could get them.

14 THE COURT: That is not essentially getting them. It
15 is asserting a certain degree of power, but that didn't prevent
16 them from suing other than their own personal embarrassment.

17 MS. FEGAN: Your Honor, what we see across the board
18 with respect to class members is that he used particular women
19 to ensure that they knew that, the class of women knew that if
20 they complained that they would be blacklisted and they would
21 never work again.

22 THE COURT: Before I get into the class, I have to
23 deal with the six individual plaintiffs, so let's focus on
24 them.

25 MS. FEGAN: Understood, your Honor. If we are talking

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1 about the RICO claim, they could not have discovered their
2 injury until the time, because in this case we are talking
3 about for RICO --

4 THE COURT: The injury was to business or property,
5 and I assume the business was their being able to be actresses?

6 MS. FEGAN: In part, your Honor.

7 THE COURT: But there's no allegation that they tried
8 to get parts and were denied parts or that they should have
9 gotten parts.

10 There is an allegation that at the time of the sexual
11 assault, if you want to put it that way, if they rebuffed
12 Weinstein, they lost their parts. That's true. I accept it as
13 true. But there is no allegation of anything after that.

14 MS. FEGAN: Your Honor, what we know is that there is,
15 I am going to call it the hit list. That's what it's called in
16 the common vernacular.

17 THE COURT: But no one knew it at the time.

18 MS. FEGAN: That's right.

19 So, when they were denied parts, they didn't know that
20 he could have had a hand in it. They could not have discovered
21 that until this past November.

22 THE COURT: It may be that you can make out a case,
23 but there is no allegation of their even trying to get parts.

24 What was it that was injury to their business or
25 property?

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1 MS. FEGAN: Your Honor, in that case we could
2 certainly allege their history of auditioning or pitching and
3 being denied or --

4 THE COURT: You asked for leave to amend, and I grant
5 that.

6 MS. FEGAN: Thank you, your Honor.

7 THE COURT: But I am dealing with the present
8 complaint. Unless there is something to show an injury to
9 business or property that warrants this finding of
10 intimidation, you can't go further.

11 MS. FEGAN: I think that that is something that we can
12 cure on amendment, your Honor. At the time that we filed the
13 complaint, it was right after the -- within months of the hit
14 list becoming released.

15 What we do know is since the complaint was filed that
16 there have been directors who have come forward and identified
17 particular parts that people didn't get because Mr. Weinstein
18 picked up the phone and said, Not her, we are not going to cast
19 her. The directors didn't know why and went along with it, and
20 they have come forward. That is something I believe we can
21 cure.

22 THE COURT: You have to allege Weinstein was doing
23 this up to four years before December 6, 2017 so that you are
24 within the statute of limitations period.

25 MS. FEGAN: But, your Honor, in that respect we would

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1 assert that tolling applies, because they could not have known.
2 The directors did not tell them at the time that the reason
3 they didn't get the part was because Mr. Weinstein intervened
4 and said that. They just knew they didn't get the part.

5 Of course, there's going to be parts that people get
6 or don't get. The difference here is that if Mr. Weinstein
7 intervened --

8 THE COURT: You are saying that their cause of action
9 was not necessarily the predatory act that occurred with
10 Ms. Kendall in 1993, with Ms. Brock in 1998 and so on. It was
11 the continued inability to get parts that continued up to and
12 through the four-year period before the filing of the
13 complaint?

14 MS. FEGAN: That's exactly right, your Honor.

15 THE COURT: That is something that needs to be shown.

16 MS. FEGAN: OK.

17 THE COURT: So, Mr. Putnam, supposing they show
18 that -- you may stay in your place, Ms. Fegan.

19 MS. FEGAN: OK.

20 THE COURT: You can stand up, Mr. Putnam.

21 MR. PUTNAM: Yes, sir.

22 THE COURT: Suppose they are able to show that.

23 Wouldn't that be sufficient to make out an equitable
24 estoppel, at least from the point of view of the pleadings?

25 MR. PUTNAM: For the pleadings, I think not, your

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1 Honor, because I think that you have to do it as to each
2 individual defendant. They talk about a hit list.

3 THE COURT: I grant you that. But let's start with
4 the whole notion.

5 MR. PUTNAM: OK.

6 THE COURT: The whole notion I think, as Ms. Fegan
7 points out and says that she will be able to do with an
8 amendment, would arguably at least one defendant within the
9 statute of limitations. Whether there is a RICO claim is
10 another story that we'll get into.

11 MR. PUTNAM: Yes.

12 THE COURT: What is your take on that?

13 MR. PUTNAM: My take on it, your Honor, is this, to be
14 frank. We were here at a status conference several months ago
15 where you brought up this very issue. You asked Ms. Fegan this
16 very question in reference to whether or not there would be
17 something that would be brought in. We were told she would
18 look at that.

19 I was admonished at the beginning of this, your Honor,
20 for too much briefing. All of this briefing we have now done
21 becomes unnecessary because she is going to be able to do what
22 you asked to be done when we all met months ago.

23 THE COURT: What is your backup argument?

24 MR. PUTNAM: I am going to give you my backup
25 argument.

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1 THE COURT: Plan A is not working.

2 MR. PUTNAM: My backup argument, your Honor, is this:
3 Throughout the present complaint, and perhaps why Ms. Fegan
4 said she didn't need to amend is because throughout what she
5 talks about is the idea of what you started with your Honor,
6 which is the idea that, because of fear, these people say
7 throughout the complaint that they stopped going to get try to
8 get parts. They were not given parts because of it. They
9 stopped into the business. They left the business.

10 THE COURT: She's adding one thing crucial. She is
11 adding calls from for Mr. Weinstein to various producers, Don't
12 give her the part.

13 MR. PUTNAM: You have to show that they in fact didn't
14 get the part for that reason.

15 THE COURT: They would have to be able to plead it in
16 good faith.

17 MR. PUTNAM: Yes.

18 THE COURT: Supposing they did.

19 MR. PUTNAM: If they could plead that in good faith,
20 your Honor, they might have a cause of action as to that one
21 person.

22 THE COURT: OK. Got you.

23 Ms. Fegan, don't you have to show that -- well, I
24 guess that depends if you are going to show an association and
25 an enterprise.

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1 MS. FEGAN: That's correct, your Honor.

2 THE COURT: But you would have to show that enterprise
3 and association continuing into the period of limitations --

4 MS. FEGAN: Absolutely, your Honor.

5 THE COURT: -- against each defendant.

6 MS. FEGAN: That we can do.

7 THE COURT: How would you do that?

8 MS. FEGAN: Well, in several ways, your Honor.

9 THE COURT: Let's say I grant you the right to plead
10 another claim, a more plausible claim against Harvey Weinstein.
11 What about the others?

12 MS. FEGAN: Your Honor, there is a number of ways we
13 can do that. I will try, your Honor, the list here. By way of
14 example --

15 THE COURT: You can look at your notes. This is not a
16 memory test.

17 MS. FEGAN: If we start with Miramax, your Honor, even
18 post when Harvey Weinstein left and started the Weinstein
19 Company with his brother, Miramax and the Weinstein Company
20 continued to coproduce movies, some of the very movies that we
21 are talking about and would be the subject of an amended
22 complaint. They coproduced Project Runway, a very famous show.

23 THE COURT: Lots of good movies. No question about
24 it.

25 MS. FEGAN: Exactly.

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1 THE COURT: They were not the only movies in
2 Hollywood. Those were the only good movies in Hollywood.

3 MS. FEGAN: Certainly ones that won a lot of the
4 awards, your Honor.

5 What we can see is, for those particular types of
6 movies and those particular projects, we would be able to show
7 continuing association between Miramax and the Weinstein
8 Company that perpetuated one Mr. Weinstein's conduct.

9 THE COURT: With Miramax that is an imputation
10 argument: Because it's president did it, therefore the company
11 is liable. But that won't help you in a RICO case.

12 MS. FEGAN: I agree, your Honor.

13 THE COURT: You will have other issues with that, too.
14 At the moment you have to plead that each defendant --

15 MS. FEGAN: Correct.

16 THE COURT: -- that each defendant knew that Harvey
17 Weinstein was attempting to blacklist the plaintiffs, each of
18 the plaintiffs until the statute of limitations period would be
19 tolled.

20 MS. FEGAN: Your Honor, I don't think we have to show
21 that each of the defendants knew that Mr. Weinstein had
22 targeted the particular plaintiffs. I think what we have to
23 show for purposes of an association in fact is that each of the
24 defendants knew that Mr. Weinstein was, one, continuing to
25 assault women and, two, was smearing them and blacklisting

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1 them.

2 The knowledge in a conspiracy like this doesn't mean
3 that each participant has to know each time he targeted a
4 particular person, but they do need to know the common purpose.

5 THE COURT: How do you allege enough to make it proper
6 that each defendant is held in the case?

7 Isn't it required to plead for each person separately
8 that they knew of this continuing effort of Harvey Weinstein to
9 blacklist the plaintiffs. You have to allege that in good
10 faith.

11 MS. FEGAN: I think we have to allege in good faith --

12 THE COURT: Can you do that?

13 MS. FEGAN: I think we can allege in good faith, your
14 Honor, that each of the defendants knew that he was engaged in
15 a campaign of coverup against his victims.

16 THE COURT: Coverup, what does that mean?

17 MS. FEGAN: Coverup means that he was hiring spies to
18 go talk to them to ensure that they weren't going to talk about
19 their experiences with Mr. Weinstein.

20 THE COURT: That happened a lot later.

21 MS. FEGAN: It happened through 2017.

22 THE COURT: Through when?

23 MS. FEGAN: It happened through 2017, your Honor.

24 THE COURT: You only allege it happening in 2017. It
25 is not continuous.

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1 MS. FEGAN: Your Honor, at this point what we have
2 that's been leaked to the media -- not by us, but that's where
3 we got it -- were certain Black Cube contracts, for example,
4 that Mr. Weinstein entered into using his lawyer's name.

5 THE COURT: Right.

6 MS. FEGAN: We don't have all of them. They are in
7 the hands of the defendants.

8 THE COURT: But it's the expression of that, not the
9 hiring, but the expression. It is not just an investigation of
10 a person. It's a certain way of intimidating the person by the
11 manner of investigation.

12 So, if a reporter for Page Six of the New York post
13 calls, that is not intimidation. It's a certain way of
14 questioning to let the person know that she is being
15 threatened.

16 MS. FEGAN: It is a part.

17 THE COURT: Yes.

18 MS. FEGAN: It is after getting the information then
19 letting them know that they have it and they're going to use it
20 to smear them. So it may not be in that conversation itself.
21 It may occur after. That is certainly true for the predicate
22 acts of the witness tampering, your Honor.

23 THE COURT: I think you need, Ms. Fegan, to show that
24 each defendant personally was aware of the continuing effort by
25 Harvey Weinstein to intimidate them.

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1 MS. FEGAN: OK, your Honor.

2 THE COURT: If you can't do that, I think that
3 defendant has to be dismissed.

4 MS. FEGAN: Your Honor, that is just one of three
5 types of predicate acts we have.

6 So, in the event that, for example, we weren't able to
7 connect a particular director to witness tampering, we
8 nonetheless have the mail and wire fraud predicate acts here.
9 That in and of itself is sufficient.

10 THE COURT: You would have to prove the mail and wire
11 fraud for each defendant.

12 MS. FEGAN: Correct.

13 THE COURT: You are talking about conspiracy.

14 MS. FEGAN: Correct.

15 THE COURT: So, to prove a conspiracy, you need to
16 prove that the person implicated knew about the conspiracy and
17 consciously made it his own. You would have to at least plead
18 in good faith that each defendant knew of this effort by Harvey
19 Weinstein and others whom he enlisted to silence the women and
20 that they participated in some fashion in doing that.

21 MS. FEGAN: I agree, your Honor.

22 That we can do, and we can certainly demonstrate
23 through the mail and wire fraud their participation.

24 THE COURT: So, Mr. Putnam, let's take Ms. Fegan at
25 her word.

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1 If she does that, would you concede that a cause of
2 action has been alleged?

3 MR. PUTNAM: I would have to see that, as you note,
4 your Honor, as to every defendant. Most important, your Honor,
5 what I want -- if I am going concede, I am not going to concede
6 what Ms. Fegan alleged. She said that it was sheer knowledge
7 of Mr. Weinstein doing so.

8 THE COURT: She has to allege that in good faith. I
9 know you deny it. That is not the point. My question is, if
10 she alleges it, and you don't have a Rule 11 objection, would
11 she make shake out a good cause of action?

12 MR. PUTNAM: The answer I was going to say -- I am
13 sorry I didn't get there quickly enough -- was, no, she would
14 not.

15 THE COURT: You don't have to get there quickly.

16 MR. PUTNAM: The reason she would not, your Honor, is
17 because mere knowledge is not enough. You have to actually
18 have an interest. You have to have some kind of control over
19 the ongoing continuous action. That's not alleged there.

20 THE COURT: Not control, Mr. Putnam.

21 MR. PUTNAM: Operation and management, your Honor.

22 THE COURT: You need to make yourself part of it.

23 MR. PUTNAM: Exactly.

24 THE COURT: You need to have some overt act by which
25 maw make yourself a part of the -- I am not sure about the

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1 overt act either. But you have to make yourself part of the
2 conspiracy. You have to adopt it. You have to make it your
3 own project.

4 MR. PUTNAM: To do so, your Honor, that is more than
5 just knowledge. The Second Circuit has made clear knowledge is
6 not enough.

7 THE COURT: But she says that she can do more than
8 knowledge. She can show that. For example, their continued
9 interest in their positions in Miramax, the continued amount of
10 money that Harvey Weinstein brought in to Miramax, so they all
11 helped him in his way, helped him intimidate. It is a tall
12 order, but if she says she can do it, I am taking her at her
13 word now, and let's see if she can do it.

14 MR. PUTNAM: If I may, your Honor, I am not quite sure
15 what that means, to continue to bring money into Miramax. I
16 think if one is operating with one's normal business
17 operations, that is not a RICO violation.

18 THE COURT: I understand that.

19 MR. PUTNAM: A coproduction --

20 THE COURT: I have dealt enough with conspiracy cases,
21 and what I don't remember Mr. Finzi will teach me again, but I
22 am assuming that she would be able to allege it in good faith.

23 Now the next thing I want to ask you about is the
24 question of injury to business or property. Essentially these
25 are personal injuries. The persona of the plaintiff has been

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1 violated in a profound way.

2 She claims -- and there's no reason not to believe
3 it -- that she lost her sense of autonomy and integrity and
4 self-awareness, self-confidence because of the way that she was
5 treated by Harvey Weinstein.

6 At the pleading stage I have to accept that. But is
7 that personal injury an injury to business because she makes an
8 allegation that her acting career was harmed?

9 MS. FEGAN: No, your Honor.

10 THE COURT: No?

11 MS. FEGAN: I believe that the emotional distress and
12 physical symptoms that these women had after the assaults is
13 not what we're trying to recover under the RICO claim. We are
14 pleading those with respect to the state law claims.

15 THE COURT: Say that again.

16 MS. FEGAN: We are pleading those injuries with
17 respect to the state law claims, but not the RICO claim. The
18 RICO claim we are alleging two types of injuries, injury to
19 their reputations and to their careers.

20 THE COURT: I don't think that qualifies for business
21 or property.

22 MS. FEGAN: Your Honor, it does under a Second Circuit
23 case named *Securitron Magnalock*. It is at 65 F.3d 256.

24 There, the Second Circuit affirmed a verdict --

25 THE COURT: Spell the name.

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1 MS. FEGAN: *Securitron*, S-e-c-u-r-i-t-r-o-n.

2 In that particular case, the Second Circuit affirmed a
3 verdict on a RICO claim where there were damages of \$100,000
4 for an injury to reputation and loss of goodwill.

5 In that particular case the underlying predicate acts
6 were that the RICO conspiracy targeted the reputation of the
7 business to ensure that it didn't continue to get contracts.

8 THE COURT: What was the business?

9 MS. FEGAN: In that particular case I believe it was
10 some kind of keylock-type service.

11 But the point there is that --

12 THE COURT: So does a personal service equate to a
13 business?

14 MS. FEGAN: Your Honor, I would not call an actor's
15 job a personal service. I think, just like a lawyer provides a
16 service -- and I would call my career a business -- I think
17 that is the same for actors and actresses.

18 THE COURT: It's a business because you --

19 MS. FEGAN: You have a service to sell.

20 THE COURT: An office, you have help, you have
21 telephones. I guess you could say the actor does that the same
22 way through an agent.

23 MS. FEGAN: Exactly. They have to work the phones,
24 they have to attend meetings, they have to do the same types of
25 correspondence that we would do to make sure that we are

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1 marketing and our services are sold.

2 If someone interferes with that and there is an injury
3 to your reputation, there is a loss of goodwill, because
4 Mr. Weinstein says that that movie is not going to make money
5 if we cast Louissette Geiss or we cast Zoe Brock. So the
6 director doesn't know that he has an ulterior motive and says
7 OK, and they blacklist that actress.

8 THE COURT: If you spurn me, you will never work
9 again.

10 MS. FEGAN: That's right. Your Honor, in this
11 context --

12 THE COURT: And enough threats to make that palpable.

13 So how can damages be more than speculative?

14 You have the type of business that acting in the
15 movies reflects.

16 MS. FEGAN: Your Honor, it is actually an interesting
17 question that has been batted around respect to the Game of
18 Thrones.

19 What we have seen there is that a director has come
20 forward and said that Ashley Judd was not cast in the Game of
21 Thrones because Mr. Weinstein intervened and said don't. What
22 we know is how much money the Game of Thrones series has made.
23 We know what the actual actors and actresses that were cast in
24 those movies made and will make in royalties and other types of
25 agreements.

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1 THE COURT: When was she denied the role in that --
2 Don't shake your head, please, Mr. Putnam. That is
3 not professional.

4 When was she denied a role in Game of Thrones?

5 MS. FEGAN: When was she denied it?

6 THE COURT: When?

7 MS. FEGAN: At the outset.

8 THE COURT: When?

9 MS. FEGAN: The director wanted to cast her after
10 auditions, and Mr. Weinstein --

11 THE COURT: So when did that occur? That is more than
12 four years ago?

13 MS. FEGAN: I understand what you are saying. I
14 apologize. I didn't understand.

15 THE COURT: All right.

16 MS. FEGAN: Your Honor, I think that --

17 THE COURT: What about that argument, Mr. Putnam?
18 That seems to be a really good argument, that acting is a
19 business like any other business --

20 MR. PUTNAM: Sure, your Honor.

21 THE COURT: -- any other personal service business.

22 If you injure the ability to earn money as an actor,
23 you are injuring an interest in a business.

24 MR. PUTNAM: If I may, your Honor, the reason I shook
25 my head is because Ashley Judd is not a plaintiff in this

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1 lawsuit. The reason I did that, your Honor, is because here --

2 THE COURT: She's just using that as an example.

3 MR. PUTNAM: But there's no such example in the
4 complaint or even alleged here today.

5 THE COURT: I know. But she says that she can do it,
6 right?

7 MS. FEGAN: That's correct, your Honor.

8 MR. PUTNAM: As to *Securitron*, your Honor, it is a
9 lock case. It is not a services case. It's about locks, like
10 actual locks.

11 THE COURT: Locks.

12 MR. PUTNAM: Like locking a door.

13 THE COURT: I understand. It is a business.

14 Ms. Fegan says that an actor sets up a place, the
15 actor's home, or more likely the agent, and there are
16 telephones and there are services and there's percentages and
17 there's commissions. It is a business. Acting is a business.

18 I mean, you could say a lawyer is a professional.
19 He's not a businessman. We all know that that is a charade.

20 MR. PUTNAM: That I agree with.

21 Your Honor, I think in this instance --

22 THE COURT: Only judges work for free.

23 MR. PUTNAM: I think, your Honor, we have actually
24 cited to cases that show this is not the case. In *WWE*, which
25 is the wrestling case, they are talking about the speculative

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1 nature of such claims. The idea is you have to have a certain
2 specificity here.

3 That is why Rule 9 applies in these instances. It is
4 the idea that you not only have to have an example like a Games
5 of Thrones example, where a specific contract was not received
6 by the person, but it also has to be that the person decided,
7 the casting agent and/or director for Game of Thrones,
8 Mr. Benioff, would have had to have come in and said, I am not
9 hiring this person because I was convinced by Mr. Weinstein or
10 others in the conspiracy that she should not be hired.

11 THE COURT: That seems right, Ms. Fegan. What do you
12 think about that?

13 MS. FEGAN: Your Honor, first, Rule 9 does in the
14 apply to RICO injury. Rule 8 does. Rule 9(b) only applies --

15 THE COURT: It has to be plausible. There has to be a
16 finding of plausibility.

17 Mr. Putnam's point is that acting is so unpredictable
18 that anything is speculative unless you get a specific job. If
19 the plaintiff was involved with Games of Thrones and she was
20 denied a job sometime after December 2013, you could sue. But
21 if we don't have any specified, identifiable jobs, all we have
22 is the actor's ability to get a job, and the actor can get a
23 job with someone that doesn't throw off any money. How do we
24 fix damages?

25 MS. FEGAN: Your Honor, first of all, at this point,

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1 we don't need to actually affix damages. What we do need to be
2 able to say --

3 THE COURT: I know. But we can't say it's
4 speculative.

5 MS. FEGAN: That's right, your Honor. What we do need
6 to be able to say is our particular plaintiffs were targets of
7 this scheme.

8 What we can't know until discovery is, for example,
9 who Mr. Weinstein spoke to. I can't ask Mr. Weinstein that.
10 We don't have his e-mails where he e-mailed -- and we know that
11 there were e-mails going around -- where he e-mailed particular
12 people and said, no, we are not going to hire her.

13 THE COURT: I don't think I can decide this at this
14 go-round. I think we are going to have another go-round.

15 MS. FEGAN: Agreed.

16 THE COURT: The standard is laid out in *First*
17 *Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768, where
18 the Second Circuit said in 1994: "Thus, the courts regularly
19 have held that a plaintiff who alleges injuries that are
20 indefinite and unprovable does not have standing under and
21 cannot recover damages pursuant to RICO. Furthermore, a mere
22 expectation cannot constitute business or property under RICO."
23 And for that is *Villoldo v. BNP Paribas S.A.* That's Federal
24 Appendix, so it's not supposed to be cited, but I remember that
25 because it was a reversal of one of my cases.

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1 MS. FEGAN: Your Honor, we will take that into
2 consideration.

3 THE COURT: You have to bring yourself under that
4 rule. It is a pretty high standard. It is a pretty high bar.

5 MS. FEGAN: Understood.

6 THE COURT: Next defendants challenge the issue of the
7 pattern of racketeering activity. They say it can't be
8 slavery, forced labor, or sex trafficking under 18 U.S.C.
9 Section 1590 and 1591 because there was no commercial sex act,
10 no offer of something valuable in exchange for sex. But I
11 think you would argue that the explicit exchange was a job in a
12 good movie for sex.

13 MS. FEGAN: That is absolutely right, your Honor.
14 Judge Sweet --

15 THE COURT: If you indulge me, you get the part. If
16 you don't indulge me, no part.

17 Right?

18 MS. FEGAN: That is exactly right. That is a
19 portion --

20 THE COURT: Mr. Putnam, that seems to be a good
21 argument.

22 MR. PUTNAM: This is one of the arguments we didn't
23 make in our papers, your Honor, so I am just going wing it,
24 because I know --

25 THE COURT: You read the others.

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1 MR. PUTNAM: I will rest on the papers of my
2 colleagues.

3 THE COURT: If you don't do a good job whoever is the
4 author of that part can stop you. You better do a good job.
5 You go.

6 MR. PUTNAM: I think it depends on how alleged, your
7 Honor. Generally the allegations of the complaint go into no
8 specificity. Therefore, to simply state that it is part of a
9 predicate act because of a general allegation should not and is
10 not enough.

11 THE COURT: We don't know. We don't know what
12 happened. Harvey was not attractive in such a way as Paul
13 Newman was attractive. He wanted sex, and he was trading in
14 it. Give me sex, you got a job. Don't give me sex, no job.
15 That is the allegation.

16 MR. PUTNAM: Yes, your Honor.

17 THE COURT: It is not proved. It is the allegation.
18 It seems to me it is a good allegation.

19 MR. PUTNAM: OK.

20 THE COURT: Yes?

21 MR. PUTNAM: OK.

22 THE COURT: Another predicate act that they allege is
23 witness tampering.

24 Where is the official proceeding that was involved? I
25 don't think you have that.

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1 MS. FEGAN: Your Honor, there need not be an official
2 proceeding pending at the time that the witness is tampered
3 with.

4 In fact, we believe and I think that the criminal
5 resource manual for the Department of Justice shows that there
6 may not be an actual federal proceeding or proceeding pending
7 at the time because that would eviscerate the purpose of the
8 witness tampering,

9 THE COURT: Who was tampered? Who was the witness?

10 MS. FEGAN: In this particular case it's in some
11 instances the victims themselves where they are threatened.

12 THE COURT: Can that be witness tampering?

13 MS. FEGAN: That can be, your Honor, to prevent them
14 from going to complain in the first instance.

15 THE COURT: Mr. Putnam, can that be witness tampering?

16 MR. PUTNAM: No, it can't, your Honor, particularly
17 when they don't say who tampered, when tampered, how tampered.
18 Beyond the fact that one can't tamper with one's self, it
19 wouldn't be witness tampering.

20 THE COURT: If they do that, can they allege it with
21 respect to a victim?

22 MR. PUTNAM: If they did it as to witnessing
23 another's. But as indicated and as your Honor indicated --

24 THE COURT: You can be a witness for yourself.

25 MR. PUTNAM: Well, then there would be a RICO claim

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1 for every -- witness tampering that exists in every such
2 instance.

3 THE COURT: That would be the predicate act. That is
4 what she alleges. I don't know the answer. I don't have any
5 cases on that point. Anybody want to add to that point?

6 Anybody found a case?

7 MR. PUTNAM: Yes. Why don't we hand our briefing,
8 your Honor --

9 THE COURT: Why don't you take it down a step to the
10 law clerks.

11 MR. PUTNAM: And, better yet, partners, who know
12 better than you do.

13 What we had in our brief your Honor is what I think
14 you were alluding to in the beginning. The idea from *Miller*
15 2007 WL 4207282 at *7, Southern District. It is in footnote 6.
16 Where it dismisses the RICO claim because the plaintiff failed
17 to allege any federal proceeding, or the defendants hindered
18 communication or information between a law enforcement officer
19 or a federal judge relating to any federal offense, which is
20 what I thing you were referring to.

21 THE COURT: I don't think Sam could take that down.
22 Why don't you repeat it slower.

23 MR. PUTNAM: Please, your Honor.

24 Miller, 2007 WL 4207282 at *7, note 6.

25 THE COURT: OK. So that's dealing with section

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1 1512(a), a crime to kill or attempt to kill another person or
2 use physical force of the threat of physical force or the
3 threat of physical force against any person to prevent the
4 attendance or testimony of any person in an official
5 proceeding, or the production of a record, document or other
6 object in an official proceeding.

7 That's the case that says official proceeding.

8 How do you get around that, Ms. Fegan?

9 MS. FEGAN: In that case, your Honor, the Court was
10 specifically focused on the fact that the witness tampering had
11 to do with state proceedings. It wasn't with respect to
12 federal crimes for which there could be federal proceedings.

13 THE COURT: That's the way you distinguish it.

14 MS. FEGAN: That's the way I distinguish it. Here we
15 are talking about sex trafficking violations.

16 THE COURT: What is plan B if that doesn't work?

17 MS. FEGAN: Your Honor, I don't have a case with me on
18 that point, but I do believe that the cases are consistent that
19 the question is whether there is a potential federal crime to
20 be reported.

21 THE COURT: I think *Miller* has got it right. Who was
22 the judge in *Miller*? LAP?

23 MR. PUTNAM: Preska.

24 THE COURT: I think she's got it right. Witness
25 tampering is out.

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1 Mail or wire fraud. All of these allegations that you
2 make are person-to-person. No one has written any letters. No
3 one sent any e-mails.

4 MS. FEGAN: Yes, your Honor, they have.

5 THE COURT: They have?

6 MS. FEGAN: Yes.

7 What we know, for instance, with respect to the
8 directors is that they weren't all coming in to town, into New
9 York to meet in a room, for example, to negotiate
10 Mr. Weinstein's 2015 employment agreement. They were in
11 California, they were in Florida, they were in France, they
12 were in Toronto.

13 THE COURT: Let's say that Harvey Weinstein was the
14 worst person in the world who produced the greatest movies in
15 the world. Why is it is a wrongful act to let him stay as
16 president? In a different time every one did.

17 MS. FEGAN: They built into his employment agreement a
18 way for the company to actually make money on the assaults. By
19 way of example, if he were to assault the first woman, he would
20 pay a fine of \$250,000.

21 THE COURT: They tried to put a damper on his conduct.
22 They knew about these allegations, and they were embarrassed by
23 them and they wanted to stop them. But they didn't want to
24 sacrifice their gifted president.

25 MS. FEGAN: So they decided to partake in the

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1 conspiracy to keep him in office, not to protect the women or
2 his victims.

3 THE COURT: I don't think so.

4 It didn't enable -- they didn't fire him. It shows
5 they knew about it, and they didn't like it. But they didn't
6 fire him.

7 MS. FEGAN: That's right, your Honor.

8 THE COURT: They didn't fire him because he was making
9 gifted movies, and they were making a lot of money for the
10 company.

11 MS. FEGAN: On the backs of the women he was
12 assaulting. They didn't try to keep him from the women.

13 THE COURT: Not necessarily.

14 The fact that these movies were great successes was a
15 consequence of many inputs, including extraordinary actors and
16 actresses that Weinstein was able to get.

17 People wanted to work for him. That was part of the
18 problem that these women had. But I don't see a mail or wire
19 fraud because of this kind of activity on the part of the
20 directors.

21 I think you are reduced to sex trafficking. You need
22 a pattern of sex trafficking to show RICO fraud. If you do
23 that, you can pass the bar.

24 Any further comment from anybody?

25 THE COURT: Yes.

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1 MR. STEIN: If I may, your Honor.

2 THE COURT: Yes.

3 MR. STEIN: Just on that point about sex trafficking,
4 I would just like to mention plaintiff's counsel referred to a
5 decision by Judge Sweet in a case called *Noble*, in which Judge
6 Sweet --

7 THE COURT: Is it the same thing?

8 MR. STEIN: The claims in that case, your Honor, were
9 brought against Harvey Weinstein and Bob Weinstein. We both
10 moved to dismiss. Judge Sweet did allow the claims against
11 Harvey Weinstein to go forward, but he dismissed the claims
12 against Bob Weinstein, my client, because there were no
13 allegations, sufficient allegations that Bob Weinstein had in
14 any way known about or participated in the sex trafficking
15 scheme.

16 THE COURT: What is the case, Mr. Stein?

17 MR. STEIN: It is *Noble v. Weinstein* 2018 WL 3863452.
18 It's Southern District, August 14, of this year. The civil
19 action number is 17 Civ. 9260.

20 As Judge Sweet said there, guilt -- or in this case
21 liability -- cannot be established by association alone. And
22 he found that that's essentially what the claimant was trying
23 to do. In this --

24 THE COURT: I've got the point.

25 MR. STEIN: Got it.

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1 MS. FEGAN: We have an additional set of allegations,
2 your Honor, that I would like focus on. We have allegations
3 from women inside the company that they complained and wrote
4 memos to the executives outside of Mr. Weinstein, Harvey
5 Weinstein, to advise them of the wrongdoing within the company,
6 to advise them that they were being taken to meetings by
7 Mr. Weinstein to act as these honeypots to lure the victims in,
8 to make them comfortable, and that they knew that these women
9 were then assaulted. In fact, the employees had to go in and
10 clean up after that.

11 THE COURT: After what?

12 MS. FEGAN: The women had to clean up after the
13 assaults, the employee women.

14 So what we know is it is not just that they wanted to
15 keep him in with this employment agreement. We know that
16 within the company there was correspondence that went to the
17 board that advised them that these things were going on and
18 that it was wrong.

19 Rather than change, rather than do anything to ensure
20 that the pattern of assaults stopped, they ignored it. They
21 put one of the women who wrote one of memos under an NDA, a
22 nondisclosure agreement, to insure that she didn't tell anyone
23 what Mr. Weinstein was doing, to ensure that he couldn't be
24 stopped.

25 So we think that the employment agreement is an

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1 example, but that is not the only thing. It is not just
2 passive. It is actually hiding, burying, and concealing what
3 was occurring. And those discussions occurred with the use of
4 the mails and wires, your Honor.

5 So, in any event, we can certainly plead those
6 allegations.

7 THE COURT: Let me get this right.

8 MS. FEGAN: Yes.

9 THE COURT: So the effort to conceal shows the
10 complicity of whoever was concealing?

11 MS. FEGAN: That's correct.

12 THE COURT: And who was that?

13 MS. FEGAN: Who was concealing, or who was --

14 THE COURT: Yes.

15 MS. FEGAN: The directors.

16 THE COURT: For example, to whom were these letters
17 written?

18 MS. FEGAN: They were written up through the COO and
19 shared with the board, your Honor, and the COO being David
20 Glasser.

21 THE COURT: The provision in the contract with Harvey
22 Weinstein is if you do it one time you get fined a certain
23 amount, you do it two times, a higher amount and so on. So
24 they knew it. No question that they knew.

25 MS. FEGAN: They knew, and they helped cover it up.

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1 THE COURT: The question is whether they were
2 obligated to fire him.

3 MS. FEGAN: Your Honor, I think that becomes a
4 question of fact.

5 THE COURT: No. It is not a question of fact. The
6 facts are clear. The facts are that the board knew but didn't
7 fire him.

8 MS. FEGAN: They are other steps they could have taken
9 to ensure that he couldn't continue the conduct.

10 THE COURT: How?

11 MS. FEGAN: They could ensure that when he walked in
12 his office with one of our clients he didn't lock the door and
13 keep her in there while he assaulted her.

14 THE COURT: How would you do that?

15 MS. FEGAN: Well, first of all, I --

16 THE COURT: Hire a policeman to stand at Harvey
17 Weinstein's door?

18 MS. FEGAN: No, but I think you would make sure that
19 he didn't lock women in with him when the people outside that
20 office knew exactly what was going to happen. Not only did
21 they know what was going to happen, they had to supply him --

22 THE COURT: They were rather powerless, though,
23 weren't they?

24 MS. FEGAN: No, your Honor. Absolutely not.

25 THE COURT: They were secretaries and clerks.

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1 MS. FEGAN: These secretaries and clerks went to the
2 men with power.

3 THE COURT: They did and wrote the letter, and the
4 letter resulted in a contract, and the contract had a clause
5 about a fine and a sanction. But the directors decided that
6 they did not want to terminate. I can't see how that is a
7 wrongful act.

8 MS. FEGAN: There are other steps that the directors
9 could have taken to ensure that this didn't continue to happen,
10 your Honor, and still keep him in his on job. They chose not
11 to do it, your Honor. I do believe that it is a question.

12 THE COURT: Other than unlocking the door or taking
13 out the locks in the doors, what?

14 MS. FEGAN: Well, by way of example, he would set up
15 office like at the Sundance film festival or the Cannes
16 Festival in France. He would set up his office in a hotel
17 suite. He would knowingly have, for example, the head of
18 Miramax Italia and other employees go out there and procure
19 women for him. Say, oh, Harvey Weinstein wants to see you. I
20 think you would be perfect for this part. Knowing they weren't
21 delivering those women for a part. They were delivering those
22 women because they knew that Mr. Weinstein was --

23 THE COURT: Anybody who did that I think you would
24 have a very good argument.

25 MS. FEGAN: But those acts were reported. So those

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1 executives are the ones that report to the various boards. So,
2 your Honor --

3 THE COURT: You haven't named anybody. I think you
4 have to name people.

5 MS. FEGAN: All right. We will do that, your Honor.

6 MR. FINZI: Your Honor?

7 THE COURT: Yes, Mr. Finzi.

8 MR. FINZI: Along those lines, I just want to make
9 sure the record is clear. There have been references here to
10 the outside directors as a group, and the work they did in 2015
11 in terms --

12 THE COURT: She has to be specific. She can't say
13 outside directors. She has to be specific.

14 MR. FINZI: Even more than that, your Honor, there's
15 two defendants here that weren't members of the board at the
16 time. There are two defendants --

17 THE COURT: What about this, Ms. Fegan.

18 MR. FINZI: Just one more second, your Honor. It is
19 alleged in the complaint.

20 THE COURT: I have the point.

21 What is the response?

22 MS. FEGAN: I think that gets to what we are talking
23 about, about these complaints.

24 The employment agreement is one piece that we would
25 argue fits that. There's other -- for example, in 2016 at the

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1 time that Mr. Lasry was on the board, which is with after when
2 the 2015 employment agreement was signed, there were additional
3 complaints made that the board was aware of.

4 THE COURT: Not by these women. You have to have an
5 allegation by these identifiable plaintiffs. I think Mr. Finzi
6 is right. I don't think you can have a cause of action against
7 people who weren't on the board at the time.

8 MS. FEGAN: It depends on what the act is. I hear
9 what your Honor is saying. When we amend, we will make sure
10 that we have connected each one to a particular act.

11 THE COURT: All right. Hold onto your argument, Mr.
12 Finzi, you will make it a second time.

13 Let me ask you whether or not you can claim as an
14 enterprise or association in fact employees of a company and
15 the company. Isn't the company the personality that you wish
16 to sue, and don't all these people work for that company?
17 Leave out the directors, but the officers, employees?

18 MS. FEGAN: Your Honor, if our enterprise alone was a
19 single company and its employees, we would not be able to state
20 a claim because we wouldn't have separate person.

21 Where we are talking here about a conspiracy that
22 includes others --

23 THE COURT: Who are the others?

24 MS. FEGAN: So here we have alleged that there are the
25 spies that were hired through the lawyers. We have alleged

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1 that the publishers, by way of example, the National Enquirer,
2 and other media who helped engage in this --

3 THE COURT: You would have to allege that they were
4 part of a pattern of racketeering activity.

5 MS. FEGAN: That's correct.

6 THE COURT: And if they hire investigators at a
7 certain point in time, where they expressed themselves or they
8 manifest themselves at a certain point in time, that doesn't
9 show that they were there throughout. It doesn't show that
10 they were involved in a pattern.

11 They hire themselves out as investigators. It depends
12 on what they do as investigators. You can't say just because
13 investigators were hired that there was a wrong.

14 MS. FEGAN: You're right, your Honor.

15 THE COURT: There has to be instruction to them. It
16 has to go along a certain way, and it has to be expressed a
17 certain way.

18 MS. FEGAN: There are two ways that those were
19 expressed. First, we have the deception.

20 THE COURT: What is the deception?

21 MS. FEGAN: In this particular case the spies
22 contacted victims pretending to be people they weren't in order
23 to elicit information about their causes of action against
24 Mr. Weinstein.

25 You can't use deception --

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1 THE COURT: Let's they did that.

2 What does that mean?

3 What is the consequence?

4 MS. FEGAN: As a consequence of that, information
5 would be delivered back to Mr. Weinstein, and then he would
6 turn around and smear these women to ensure that they couldn't
7 and didn't have credibility.

8 So it's the deception that's involved.

9 THE COURT: Did he let that be known to these women?

10 MS. FEGAN: Well, the women knew that they were being
11 smeared in the press. They didn't know where it was coming
12 from, and they couldn't have known where it was coming from
13 until October of last year when they discovered that
14 Mr. Weinstein was behind this.

15 They didn't even know where the information, to whom
16 the information had been shared with until the fall of last
17 year, your Honor.

18 THE COURT: Mr. Putnam?

19 MR. PUTNAM: Your Honor, even accepting all of that as
20 true, which is not in the complaint, what you know your
21 Honor --

22 THE COURT: She wants to put it in.

23 MR. PUTNAM: Yes. All of that, furthest back would be
24 2016 for everything we have heard in the last 20 minutes.

25 And there were a number of people, as noted, Miramax

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1 included, that had nothing to do with any of these incidents,
2 one from 2005, others up through say 2014.

3 THE COURT: Apart from the name of the company was
4 changed, I mean Miramax was a subsidiary of Disney --

5 MR. PUTNAM: Yes.

6 THE COURT: -- and they broke in 2005 and Weinstein
7 set up his own company.

8 MR. PUTNAM: Yes, your Honor.

9 THE COURT: So your argument is that Miramax shouldn't
10 be sued?

11 MR. PUTNAM: At all. There's nothing in the
12 complaint.

13 THE COURT: Miramax shouldn't be sued for what
14 happened afterwards, and Weinstein shouldn't be sued for what
15 happened under Miramax.

16 MR. PUTNAM: Nothing can be said and nothing has been
17 said as a fact as to something that Miramax did inappropriately
18 prior to 2005.

19 THE COURT: But if the purpose of what Harvey
20 Weinstein was doing, there was a consistency between Miramax
21 and Weinstein as far as being complicit, I think she can come
22 in under the wire. I think she has a claim.

23 MR. PUTNAM: I missed one of the words, your Honor.

24 THE COURT: I said, if there was one stream of
25 activity by Weinstein and his associates, first as employees of

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1 Miramax and continuing as employees of the Weinstein Company,
2 you would have a relationship and complicity that might satisfy
3 the pleading requirements.

4 MR. PUTNAM: Just so I understand, would that be
5 because Harvey Weinstein worked with both?

6 THE COURT: And others with them.

7 MR. PUTNAM: But you would have to have the others
8 alleged --

9 THE COURT: You would have to show a consistency.

10 MR. PUTNAM: That is what I am saying.

11 THE COURT: You would have on show a continuity.

12 MR. PUTNAM: I assume your Honor is not saying it
13 isn't just that Mr. Weinstein worked at both.

14 THE COURT: No, it can't be.

15 It has to be a continuity of people around him. It
16 doesn't have to be exactly the same, but there has to be an
17 essential continuity.

18 Do you have that, Ms. Fegan?

19 MS. FEGAN: Yes your Honor.

20 THE COURT: I am finished with RICO unless somebody
21 wants to add something.

22 OK. Now there are two bases of federal jurisdiction
23 of what would otherwise be a state law cause of action. RICO
24 is one. If RICO fails, you have the Class Action Fairness Act.

25 MS. FEGAN: Correct.

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1 THE COURT: If the statute of limitations applies it
2 applies also to the Class Action Fairness Act, and you would be
3 out there, right?

4 MS. FEGAN: The statute of limitations applies to the
5 state law claims. The Class Action Fairness Act gives us
6 diversity jurisdiction.

7 THE COURT: Let me amend that.

8 If you are dealing with the state causes of action,
9 you have statute of limitations pertaining to those state
10 causes of action. Assuming that the statute of limitations is
11 either tolled or is not a bar, the question I am putting to
12 everyone is whether or not a claim is stated under the Class
13 Action Fairness Act and essentially two or three points to
14 inquire into.

15 First, are there other class actions pending?

16 MS. FEGAN: There are not, your Honor.

17 THE COURT: There are not.

18 MR. PUTNAM: Your own.

19 THE COURT: I didn't mean her own.

20 MS. FEGAN: We have two lawsuits before you.

21 THE COURT: I mean other class actions pending.

22 Are there, Mr. Putnam?

23 MR. PUTNAM: Not that I am aware of, your Honor.

24 THE COURT: OK.

25 Second, class certifications and class definitions are

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1 generally not decided at the pleading stage. But if the matter
2 is crucial to federal jurisdiction, I would think it would be
3 decided at the pleading stage because the federal court is
4 enjoined to examine issues in jurisdiction at the earliest
5 possible time.

6 MS. FEGAN: Is there a particular issue you would like
7 me to address, your Honor?

8 I do think that what we have seen post *Wal-Mart* is
9 that Supreme Court demands that we provide for purposes of Rule
10 23 not just a legal argument, as we used to do even 15 years
11 ago. Rule 23, we would do a class certification brief that
12 wasn't accompanied by evidence.

13 Now the Supreme Court demands that we provide evidence
14 to demonstrate to the Court that common questions of fact
15 predominate. In order to do that, your Honor, the Supreme
16 Court has stated that it is now typical to conduct discovery --

17 THE COURT: I agree, and I don't want to do that.

18 MS. FEGAN: But we would like a fast track, your
19 Honor. I am not suggesting that we want to draw this out.

20 THE COURT: The only point is whether I need to decide
21 some of these issues at least at the pleading stage. If I
22 can't --

23 MS. FEGAN: Your Honor, I don't think it is
24 appropriate to decide them at the pleading stage.

25 THE COURT: These are six individuals --

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1 MS. FEGAN: Correct.

2 THE COURT: -- who have sizeable claims, each of them.
3 Whether they aggregate to \$5 million is another
4 question. We'll get into that in a minute.

5 But the individual situations it seems to me are going
6 to predominant over the class issues. I am not clear that a
7 class action is suitable. Nobody has briefed this issue.

8 I don't want to make any rulings without having briefs
9 on this issue, but I would like briefs on this issue.

10 Yes, Mr. Putnam?

11 MR. PUTNAM: One brief?

12 THE COURT: One brief, yes. It is good for everybody.
13 You are taking the initiative for this, with the
14 participation of your colleagues.

15 I would like to address two things: Whether this is a
16 proper class action; and, second, whether the statutory minimum
17 of \$5 million exclusive of interest and costs can be aggregated
18 for a class.

19 Who would the class be? Injured women, many of whom
20 are suing in their own right? And when and how was there
21 consent to any of them?

22 These are all issues. I think the defendants would
23 argue that these women came in. Weinstein had a reputation not
24 unique in Hollywood, and anybody who was going in to see him
25 could expect the worst.

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1 MS. FEGAN: Your Honor, may I address that?

2 THE COURT: I am just musing, Ms. Fegan.

3 MS. FEGAN: I understand. But I think it is an
4 important point, though.

5 THE COURT: On the other hand, it is a very important
6 that you don't blame the victim for the perpetrator's acts, and
7 what I would suggest would be blaming the victim.

8 MS. FEGAN: In part, your Honor, although I was going
9 to give an example of women who tried --

10 THE COURT: There can't be consent actually, given the
11 allegations.

12 MS. FEGAN: That's right.

13 THE COURT: They're contradictory.

14 MS. FEGAN: That is exactly right.

15 THE COURT: Because at some point the allegation of
16 each woman is that she said no to Harvey Weinstein and he
17 wouldn't take no for an answer. That enough is sufficient to
18 prove that there were predicate acts, and they overrode any
19 issue of consent.

20 But probably the jury could take that issue in fixing
21 damages I would suppose.

22 MS. FEGAN: They might, your Honor.

23 I mean, what we do have, for example, Melissa
24 Sagemiller, one of our plaintiffs, when she was told she needed
25 to go meet on the set with Mr. Weinstein in his trailer she

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1 said no. She asked that the meeting be rescheduled for a
2 public place, and his assistant said no. She was going to get
3 kicked out and off the set if she didn't go to this meeting.
4 This is not a situation --

5 THE COURT: I have seen your application.

6 MS. FEGAN: Thank you, your Honor.

7 THE COURT: But I am just thinking -- you will brief
8 this -- whether these are individual issues that will
9 predominate over the class issues.

10 There are cases all over the lot. Judge Engelmayer's
11 case. I think Judge Oetken has a case. I've got six cases.
12 The assignment committee of the court doesn't want all these
13 assigned to one judge, although one judge can take the lead.
14 But I think there probably are cases in other courts as well,
15 state and federal.

16 I think it would be useful to know that, because it's
17 relevant to a class action and to whether or not the class
18 action is a more suitable way of proceeding than individual
19 actions.

20 In the class action I would work toward some kind of
21 global settlement, which will probably involve all of the
22 attorneys. But there is a question of how to divide that among
23 each of the plaintiffs.

24 MS. FEGAN: Understood, your Honor.

25 THE COURT: You would have a serious conflict of

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1 interest in that regard.

2 MS. FEGAN: Your Honor, typically what we have seen,
3 how this plays out, and I would only hope some day there was a
4 resolution for the women, but you can see it, for example,
5 there was a Johns Hopkins settlement recently, the last several
6 years. There the allegations were a physician on the college
7 campus who had assaulted women, had taken pictures of them
8 naked without their consent and that type of thing.

9 Then you can see the archdiocese cases. One of the
10 ways that's dealt with is that typically forensic psychologists
11 are brought in during the allocation stage to deal with issues
12 of impact with respect to particular women and allocation. But
13 that's down the road, your Honor. There are ways --

14 THE COURT: There are ways to allocate.

15 MS. FEGAN: There are ways to allocate. That isn't me
16 making that decision, your Honor.

17 THE COURT: But the tendency is to fix a settlement
18 amount before people prove their individual damages.

19 MS. FEGAN: There is. There are ways to assess that
20 from jury verdicts and other ways.

21 THE COURT: The problem is that you are working on
22 some perception of adequacy in a class settlement without
23 allowing each individual to prove a case.

24 In the 9/11 cases, this question arose, and we were
25 able, because of having a common answers and common

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1 interrogatories, to get a fix on who suffered what kind of
2 damage, to have an idea of what would be an adequate amount of
3 damage. That presented a floor for the settlement.

4 As you know, the first settlement was rejected by me.

5 I am not sure you can do this in this case. If these
6 plaintiffs win, they are going to -- you are alleging that they
7 will get a million dollars each. I don't know if they will win
8 a million dollars each or close to it. I don't know if they
9 will win a million dollars each, but those numbers are big
10 enough to have individual attorneys.

11 MS. FEGAN: For purposes of the Class Action Fairness
12 Act and diversity jurisdiction, the \$5 million minimum is an
13 aggregated sum for the class as a whole.

14 THE COURT: I understand.

15 But we don't know how many are going to be in the
16 class. I don't know how you can get a fix for an aggregate
17 number without a certification and notices.

18 It's complicated. I don't want to deal with that now.
19 It is a very complicated issue. It hasn't been briefed, and I
20 like briefs.

21 So, step one, Ms. Fegan, how much time do you want to
22 amend your complaint?

23 MS. FEGAN: Your Honor, could we have 45 days?

24 There is significant legwork, but I think it can be
25 done.

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1 THE COURT: I think that is fair. I don't want
2 extensions, so pick a time you want. I will give you whatever
3 you want. If you want 60 days, you have 60 days.

4 MS. FEGAN: The end of October. I don't have a
5 calendar with me.

6 THE COURT: October 31.

7 MS. FEGAN: Thank you, your Honor.

8 THE COURT: Let's say a month after that defendants
9 will move.

10 MR. PUTNAM: Yes, your Honor.

11 THE COURT: November 30. I don't know if it's a
12 weekend. If there are weekends, go to the following Monday.

13 MS. FEGAN: Thank you.

14 THE COURT: One motion for all who want to join. One
15 brief. It is a common issue.

16 Two weeks to reply.

17 MR. PUTNAM: Thank you.

18 MS. FEGAN: Thank you.

19 THE COURT: December 15. We will fix the dates in our
20 order.

21 Yes, Mr. Putnam?

22 MR. PUTNAM: The class briefing that you requested,
23 your Honor. You want that --

24 THE COURT: Do it at the time of the opposition to the
25 complaint.

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1 MR. PUTNAM: If I may, your Honor?

2 THE COURT: Ms. Fegan, will not have to support her
3 complaint with a brief. She will wait until you first expose
4 yourself.

5 MR. PUTNAM: So we will have an opposition as well as
6 class briefing due at the time of opposition on November 30 or
7 thereafter?

8 THE COURT: I wouldn't call it class briefing. It is
9 a motion to dismiss the CAFA basis for jurisdiction.

10 MR. PUTNAM: In terms of Dunleavy, your Honor, I
11 assume we can extend that beyond the time of this briefing, the
12 other class action?

13 THE COURT: Which other class?

14 MR. PUTNAM: Right now there is another class action
15 that has been stayed during the pendency of this briefing.

16 THE COURT: Did I stay it?

17 MR. PUTNAM: Yes.

18 MS. FEGAN: The Delaney class action, your Honor.

19 MR. PUTNAM: The Delaney class action.

20 MS. FEGAN: I would suggest when we file --

21 THE COURT: Do we have separate lawyers for Delaney?

22 MS. FEGAN: It is me. What I would suggest that we do
23 Your Honor is, when we file the amended complaint we will
24 consolidate the plaintiffs so we are not dealing with two
25 separate cases.

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1 THE COURT: OK. That does it.

2 MS. FEGAN: Thank you.

3 Mr. Finzi?

4 MR. FINZI: Your Honor, how do you want us to deal
5 with -- many of the issues are common issues, and they are
6 actually the same for all the defendants. There are some
7 issues based on differences between us, sometimes plainly
8 factual --

9 THE COURT: You can do one of two things. You can
10 file your brief at the same time, but dealing only with your
11 individual issues, nothing else.

12 MR. FINZI: OK.

13 THE COURT: Or you can give Mr. Putnam a section to
14 add on.

15 MR. FINZI: We will figure it out, your Honor.

16 THE COURT: Either one. But I will take separate
17 briefs that are confined to a particular issue.

18 MR. PUTNAM: Thank you, your Honor.

19 THE COURT: Anything else?

20 Thank you for splendid argument.

21 Thank you, Ms. Fegan.

22 Thank you, Mr. Putnam.

23 MS. FEGAN: Thank you, your Honor.

24 MR. PUTNAM: Thank you, your Honor.

25 (Adjourned)